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## FOREIGN JUDGMENTS IN ENGLISH COURTS.

We are in receipt of an important and interesting decision of the Court of Appeals of the Supreme Court of Judicature (England) reversing the decision of the Chancery Division in the case of *Sarah Elizabeth Pemberton v. Hughes*. The material facts of the case were that the plaintiff, while a resident of the State of Florida, was married there according to the laws thereof to one Erwin. Four years after the marriage Erwin sued the plaintiff for and obtained a decree of divorce. The decree stood as a final and subsisting decree. Two years later, Erwin being still alive, plaintiff married one Pemberton, and they lived together as man and wife until the death of Pemberton. Under a power to charge certain estates in England with an annuity in favor of any woman he should marry, he, by his will, made plaintiff the appointee.

The defendants, who claimed the estates, disputed the validity of the appointment, asserting that the decree of divorce was void under the laws of Florida. The ground of their contention was that the subpoena issued to Mrs. Pemberton (who was then Mrs. Erwin) did not leave ten clear days between the date of the writ and the time for appearance in the suit for divorce. The evidence showed that such irregularity in practice and procedure would in any court of Florida be considered as rendering a decree of divorce null and void. In the present case the defendants claim that there being no valid divorce, there was no valid marriage between Pemberton and his so-called wife, and that hence she had no right to the jointure granted to her under the will of Pemberton. The case was originally tried in Chancery Division before Judge Kekewich, who decided that the divorce was invalid. In his opinion he declared that the preponderance of evidence of the expert witnesses called for the defendants was undoubted in establishing that such error in the serving of the subpoena would render the decree void for want of proper jurisdiction.

The reasoning of the Court of Appeals reversing this decision may be thus summarized. It by no means follows that the judgment of the Florida court was rendered absolutely void by reason of the defect in process, or that, standing unimpeached by a higher court, it would be considered invalid in a collateral proceeding in a Florida court. Even assuming that such judgment would be considered as void in such a collateral proceeding, it does not afford a sufficient reason that the same should be considered as a nullity in an English court, which looks only for a violation of substantial justice. Provided a court has territorial competence and jurisdiction, its competence in other respects is not regarded as material by English courts. Competency of a court from an international, and not from a municipal point of view, determines the validity of a judgment, and therefore it is not dependent on the exact observance of the court's own rules of procedure. A judgment of a foreign court having jurisdiction of the parties and subject matter—i. e., having jurisdiction to summon the defendants before it, and to decide such matters as it has decided—cannot be impeached in England on its merits, although there may be an error in procedure. (According to this declaration no consideration is given to the possibility that such an error in procedure might gloss over that very essential lack of jurisdiction over either the person or subject matter.) A decree of divorce altering the status of the parties concerned, and affecting the legitimacy of their afterborn children, is much more like a judgment in rem than a judgment in personam, and, therefore, the decisions on foreign judgments in rem should be the guides in determining this case. As no collusion in obtaining the divorce is shown, there is no ground upon which an English court can refuse to recognize the validity of the decree of the Florida court.

This decision may be regarded as an indirect contradiction to the general rule regarding foreign judgments in existence at the present day, which has been given clearness and definiteness by a vast series of English and American decisions. At present it is well settled that a judgment rendered by a court of competent authority and jurisdiction is absolutely conclusive as to the merits of the controversy which it settles, and to that extent is binding upon the courts of all other States and countries, and will be recognized by them as evidence of the facts decided. Moreover, at the present day there is no distinction made between judgments in rem and judgments in personam of foreign courts, but all are given the same credit. Therefore, it has always been considered that valid judgments will be both recognized and enforced if they are of such a character as to be given recognition and enforcement in the jurisdiction where they were pronounced. But it is here that the first distinction is to be found. It must always appear that there have been proper proceedings and notice to the parties in order to give the judgment conclusiveness in a foreign jurisdiction. *Bradstreet v. Neptune Ins. Co.*, 3 Sumner (U. S.) 600, is the earliest case of authority in this country. Furthermore, there has never been any doubt of recent years that a foreign judgment may under all circumstances be impeached for want of jurisdiction, either over the person or the subject matter, and in this country the rule is not changed, even by the "full faith and credit" clause in the United States Constitution. These questions were all gone into very thoroughly by the counsel on either side in the trial of this case in the Court of Appeals, yet with the result that the court unanimously handed down the decision finding that a judgment pronounced by a foreign court will be considered final in English courts, and that English courts will never investigate the propriety or validity of the proceedings of such court unless they offend against English views of substantial justice. Consequently a judgment, though void in law in the country where it is pronounced, will not necessarily be so regarded in England. There is no doubt that neither the court nor the counsel on either side were in agreement as to the principles laid down in the leading cases cited, viz.: *Vanquelin v. Bouard*, 15 C. B. N. S. 341; *Castrique v. Imrie*, 23 L. T. Rep. 48; *Dogliani v. Crispin*, 15 L. T. Rep. 44.

Lindley, M. R., said in part: "The court which pronounced the decree ought to be credited with knowing what irregularities, if any, were fatal to its jurisdiction and what were not, and the court had before it all the materials necessary for forming a judgment, and oversight or carelessness ought not to be presumed by us. \* \* \* Assuming that the defendants are right, and that the decree of divorce is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. It sounds paradoxical to say that a decree of a foreign court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it is pronounced. But this paradox disappears when the principles on which English courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings of a foreign court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to are the finality of the judgment and the jurisdiction of the court in this sense and to this extent, viz., its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it."

It would seem very much as if the distinction here introduced is so subtle and so without foundation as to have perverted the proper application of the general principles hitherto applied to the recognition of foreign judgments. The learned judge, whose opinion has just been quoted, himself admitted in another place that the courts of England do not enforce foreign judgments of courts which have no jurisdiction in the sense above explained, i. e., over the subject matter or the persons brought before them, but claims that the jurisdiction which alone is important is the territorial competence over the subject matter and the parties. If this were true any or all of the essential points of procedure in courts of law might be omitted or only partially performed, and yet a decree of the court would be considered valid. The truth of the matter seems to be that the existing, valid jurisdiction of any court is territorial in nature, and in any case is dependent upon the established procedure and the statutory enactments governing that court whose jurisdiction is under investigation. This being so, any defect of a technical nature will render the jurisdiction of the court *void*, and any decree under such void jurisdiction *absolutely invalid*. Justice Lindley, citing the cases of *Castrique v. Imrie*, 23 L. T. Rep. 48, and *Messina v. Petrocchino*, 26 L. T. Rep. 561, reiterates the proposition that a judgment of a foreign court cannot be impeached on its *merits*, but seems to stop there, and omits to notice that both those cases acknowledge in common with *Schibsby v. Westenholz*, 24 L. T. Rep. 93, that the jurisdiction of the court of a foreign country may always be inquired into in order to ascertain whether the laws of the State were conformed to in making the decree of court, or whether it was unduly or irregularly obtained. If these latter facts appear, the judgment in question is considered null and void. The English cases, too numerous to mention by name, which were cited as authority for the view that "English courts are bound to receive a judgment of a foreign court without inquiry as to its conformity or nonconformity with the laws of the country where it was pronounced," are by no means in contradiction to the leading case of *Phillips v. Hunter*, 2 H. Bl. 402, in which Lord Chief Justice Eyre draws the very distinction which escapes, apparently, the attention of Justice Lindley, and which was the basis of the general rule prevailing until the present case. Justice Eyre said in part, "In one way only is the sentence or judgment of the court of a foreign State examinable in our courts, and that is when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction we examine it as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign State is, and whether the judgment is warranted by that law." In brief, if it is proved that a foreign judgment is invalid because of some defect in procedure or in practice, the judgment is considered as not being in existence, and evidence substantiating this is always admissible in a court of another country. But if no such claim is made the verity of the judgment will stand unimpeached, as would the present judgment of the court of Florida, had not the question of the non-existence of the judgment as a judgment been raised. The only way in which, under the prevailing rule, the defendants could have been estopped from disputing the validity of the decree of divorce would have been on the ground that they were parties to the proceeding in Florida, and as this was not the fact, a refusal of the court to receive evidence adverse to the validity of the decree is inherently in opposition to the rule prevailing up to the present time.

The fundamental consideration upon which has rested the right to attack

the jurisdictional power of a foreign court has been that otherwise a citizen of one country could not avoid the effect of a judgment rendered by such court, when same is brought up in a proceeding in another court, without going back into such foreign jurisdiction, and there have the same reversed. This has never been required by English or American courts. Thus when Justice Lindley asserts that the errors of the Florida court should have been rectified by impeachment in Florida, he seeks to invoke a duty never before recognized by English courts.

#### RIGHT TO ENJOYMENT OF STREAM—PERCOLATING WATERS.

The Court of Appeals of New York extends the rights of riparian owners in *Smith v. Brooklyn*, 54 N. E. 787. Smith owned land on which there was and had been a pond and natural water-course. The city of Brooklyn, to secure water for municipal purposes, established, on land of its own, at a distance of about 2,400 feet, an aqueduct and reservoir, which it supplied with water by means of a conduit and a system of wells, pumped by powerful steam-suction pumps. When the conduit was laid the stream failed perceptibly, and when the pumping station was put in operation disappeared. Both stream and pond have remained dry ever since. The jury found that the acts of the defendant had caused the disappearance of the pond and water-course. In final affirmance, the Court of Appeals, all concurring and speaking by Gray, J., says: "The right of this plaintiff to the enjoyment of his running stream and to his pond was absolute. The diversion of the water therefrom was established as a fact by the verdict, and the right of the former to maintain the action for the recovery of damages was clear."

The doctrine that the owner of land has it to the sky and the lowest depths was very clearly modified as to water-courses in *Shury v. Piggott*, 3 Bust. 339, where Whitlock, J., says: "Ways or commons \* \* \* may become extinct by unity of possession, because the greater benefit shall drown the less. \* \* \* but a water-course doth begin *ex jure naturæ*, and cannot be averted." But *Acton v. Blundell*, 12 M. & W. 324, denied the right or interest of the owner of land, through which water flowed in a subterranean course, sufficient to enable him to bring action for its diversion by an adjacent owner. Where, however, these subterranean waters are the principal or only source of supply of a water-course on his land, what are the rights of the parties? *Greenleaf v. Francis*, 18 Pick 117, held the right of the first owner paramount, "unless he was actuated by a mere malicious intent to deprive his neighbor of the water without a benefit to himself." *Parker v. B. & M. R.*, 3 Cush. 107. The next distinction made was between a subterranean flow of water so well defined as to constitute a regular and constant stream and percolations. The former were capable of a right of enjoyment in the person on whose land they issued as a spring and could not be diverted. *Smith v. Adams*, 6 Paige 435. But the owner of land had no right of action against a neighboring owner who diverted, without malice or negligence, the mere percolations of his own land, even though a spring was destroyed thereby. *Wheatly v. Baugh*, 25 Pa. St. 528. It does not follow that each land owner has the entire and unqualified ownership of all water found in his soil, not gathered into natural water-courses in the common acceptance of that term. The rights of each land-owner being similar, and his enjoyment dependent upon the action of other land-owners, these rights must be valueless unless exercised with reference to each other, and are correlative. Each is restricted, therefore, to a reasonable exercise of his own rights and a reasonable use of his own property. *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569.